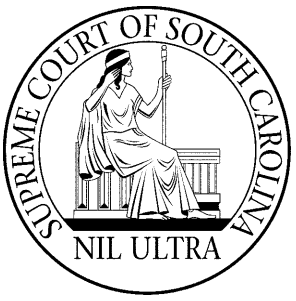

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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 25
June 25, 2014
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Diane Kirven, on behalf of herself and all others similarly situated, Plaintiff,

v.

Central States Health & Life Co., of Omaha, and Philadelphia American Life Insurance Company, Defendants.

Appellate Case No. 2013-000273

CERTIFIED QUESTION

ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
Margaret B. Seymour, United States District Judge

Opinion No. 27403
Heard November 19, 2013 – Filed June 25, 2014

CERTIFIED QUESTIONS ANSWERED

Richard A. Harpootlian, Graham L. Newman, M. David Scott, and Tobias G. Ward, Jr., all of Columbia, for Plaintiff.

John T. Lay and Laura W. Jordan, both of Columbia, and Robert L. Harris, of Richardson, Texas, for Defendants.

JUSTICE KITTREDGE: We certified the following questions from the United States District Court for the District of South Carolina:

1. Can the definition of "actual charges" contained within S.C. Code Ann. Section 38-71-242 be applied to insurance contracts executed prior to the statute's effective dates?

2. Can the South Carolina Department of Insurance mandate the application of "actual charges" definition in S.C. Code Ann. Section 38-71-242 to policies already in existence on the statute's effective dates by prohibiting an insurance company from paying claims absent the application of that definition?

We answer both certified questions, "no."

I.

This case concerns supplemental health insurance policies, which differ from ordinary health insurance policies in both purpose and operation. Indeed, "[s]upplemental insurance policies pay cash benefits directly to the policyholders, as opposed to primary insurance policies that pay benefits directly to a third-party health care provider." *Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09-CV-687-JFA, 2011 WL 2294146, at *18–19 (D.S.C. June 8, 2011) (noting the reason for this difference lies in the purpose of the policies and stating "the benefits under specified disease policies have nothing to do with how much a particular cancer treatment may cost" because supplemental insurance policies contain a "two-fold promise: a promise to pay for the medical treatment and a promise to provide its policyholders with additional monetary relief . . . to cope with the myriad of other costs and expenses that arise from their battle with cancer, but are not covered by their primary health insurance policies."); *accord Guidry v. Am. Pub. Life Ins. Co.*, 512 F.3d 177, 182 n.6 (5th Cir. 2007) ("Although the fundamental purpose of *ordinary* health insurance coverage is to indemnify against loss from disease or illness, the purpose of a *supplemental* insurance policy, such as the one at issue in this case, is not only to cover medical expenses but also . . . to provide supplemental income for general living expenses or any other purpose. Thus, the payment of benefits in amounts exceeding actual expenses does not lead to an unreasonable result." (quotations omitted)).

Plaintiff Diane Kirven purchased a supplemental Cancer and Specified Disease policy from defendant Central States Health and Life (Central States) in 1999. Under the policy, Central States promised to pay Kirven a defined benefit in an amount equal to, or based on a percentage of, the "actual charges" for certain medical and pharmaceutical cancer treatments. However, the term "actual charges" was not defined under the policy. Kirven was diagnosed with cancer in 2003, and she underwent chemotherapy and radiation treatments. Consistent with the understood purposes of a supplemental insurance policy, Central States paid Kirven benefits based on the amount she was billed by her medical providers.[1] The cancer fell into remission.

Some years later, on November 29, 2007, the United States Court of Appeals for the Fourth Circuit issued a decision construing the term "actual charges" in a supplemental cancer insurance policy virtually identical to Kirven's. *See Ward v. Dixie Nat'l Life Ins. Co*. (*Ward I*), 257 F. App'x 620 (4th Cir. 2007) (per curiam). *Ward I* involved a dispute over how benefits paid in the amount of the "actual charges" were to be calculated.[2] *Id*. at 623. The Fourth Circuit found the meaning of the phrase "actual charges" as used in Ward's policy was patently ambiguous and that South Carolina law "very clearly requires us to resolve the ambiguity in favor of the insured." *Id*. at 627 (citation omitted).

Approximately eight months later, as a direct response to *Ward I*, the General Assembly enacted South Carolina Code section 38-71-242, which includes a mandatory, default definition for "actual charges" in policies that, like Kirven's

[1] In other words, Central States paid the amount listed on Kirven's medical billing statements, regardless of whether her primary health insurance providers were able to negotiate with providers to accept a lesser amount as payment-in-full for those services.

[2] Specifically, the insureds contended the "actual charges" were the amounts billed to patients by their medical providers; however, the insurance company contended the "actual charges" were the pre-negotiated discount amount providers agreed to accept as payment-in-full for services rendered to insureds. *Ward I*, 257 F. App'x at 623–24.

policy, do not define the term. The statute essentially codified the construction of the term "actual charges" in the manner advocated by the defendant insurance companies in *Ward I* and provides as follows:

> (A)(1) When used in any individual or group specified disease insurance policy in connection with the benefits payable for goods or services provided by any health care provider or other designated person or entity, the terms "actual charge", "actual charges", "actual fee", or "actual fees" shall mean the amount that the health care provider or other designated person or entity:
>
> > (a) agreed to accept, pursuant to a network or other agreement with a health insurer, third-party administrator, or other third-party payor, as payment in full for the goods or services provided to the insured;
> >
> > (b) agreed or is obligated by operation of law to accept as payment in full for the goods or services provided to the insured pursuant to a provider, participation agreement, or supplier agreement under Medicare, Medicaid, or any other government administered health care program, where the insured is covered or reimbursed by such program; or
> >
> > (c) if both subitems (a) and (b) of this subsection apply, the lowest amount determined under these two subitems;
>
> . . . .
>
> (B) This section applies to any individual or group specified disease insurance policy issued to any resident of this State that contains the terms "actual charge", "actual charges", "actual fee", or "actual fees" and does not contain an express definition for the terms "actual charge", "actual charges", "actual fee", or "actual fees".
>
> (C) Notwithstanding any other provision of law, *after the effective date of this section, an insurer* or issuer of any individual or group specified disease insurance policy *shall not pay any claim or benefits* based upon an actual charge, actual charges, actual fee, or actual fees

> under the applicable policy in an amount *in excess of the "actual charge", "actual charges", "actual fee", or "actual fees" as defined in this section*.

S.C. Code Ann. § 38-71-242 (Supp. 2013) (emphasis added).

In light of the enactment of section 38-71-242, on remand from *Ward I*, the *Ward* defendants argued that the statute prohibited them from paying "actual charges" as defined in *Ward I*. *See Ward v. Dixie Nat'l Life Ins. Co*. (*Ward II*), 595 F.3d 164, 171–72 (4th Cir. 2010). The district court denied the *Ward* defendants' motion, finding the presumption against statutory retroactivity precluded application of section 38-71-242 to the *Ward* plaintiffs' insurance policies. The district court concluded the Fourth Circuit's *Ward I* definition of "actual charges" applied to the *Ward* plaintiffs' policies—not the definition found in section 38-71-242. *Id.*

On appeal, the Fourth Circuit affirmed the district court's finding that the presumption against retroactivity barred application of section 38-71-242 to the *Ward* plaintiffs' claims. *Id.* at 173. The Fourth Circuit noted that the *Ward* plaintiffs' claims arose prior to the statute's effective date and found the defendants failed to rebut the presumption against statutory retroactivity because "[n]either the statutory language nor the legislative history evinces any intent to apply the statute's definition to the insurance contracts in this case." *Id*. at 174–75.

In the instant case, Kirven's cancer recurred in 2009. Kirven continued to rely on the policy she purchased years earlier, long before the enactment of section 38-71-242. Kirven underwent chemotherapy and filed a claim seeking benefits under the policy with Philadelphia American Life Insurance Co. (Philadelphia American), which had acquired Central States' South Carolina policies in 2005. Philadelphia American required Kirven to submit an explanation of benefits (EOB) form as documentation of the discounted amounts her primary health insurers had negotiated to pay for her medical treatment. Unlike Central States had done previously, Philadelphia American used the amount in the EOB to calculate the benefit payable to Kirven consistent with the definition of "actual charges" set forth in section 38-71-242. Thereafter, Kirven filed suit in federal court seeking a declaratory judgment adjudicating the term "actual charges" within her insurance policy and damages from the alleged breach of that contract.

In her lawsuit, Kirven claims the definition of "actual charges" in section 38-71-242 cannot be applied retroactively to policies that existed prior to its enactment. The parties agree the legal definition of the term "actual charges," as that term is used in Kirven's policy, is dispositive of the issues in the case. As a result, the parties jointly moved to certify to this Court two separate questions regarding the applicability of section 38-71-242.

II.

Kirven argues section 38-71-242 may not be applied to preexisting contracts for several reasons: the presumption against statutory retroactivity and the doctrine of constitutional avoidance require a prospective construction of section 38-71-242, and, in any event, the application of section 38-71-242 to preexisting insurance policies would violate the Contract Clause of the United States and South Carolina constitutions. We address each of these arguments in turn.

A. Presumption Against Retroactivity

Kirven argues the application of section 38-71-242 to existing insurance policies is prohibited by the presumption against statutory retroactivity and the doctrine of constitutional avoidance. We disagree.

"It is well-established that '[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.'" *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012) (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" *Id*.

However, "[c]ourts routinely confront [] ambiguities in legislative drafting and have developed judicial default rules for just such occasions." *Tasios v. Reno*, 204 F.3d 544, 549 (4th Cir. 2000). "Both federal and South Carolina courts employ a robust presumption against statutory retroactivity." *Ward II*, 595 F.3d at 172 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *Jenkins v. Meares*, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990)). "Under this presumption, courts assume that statutes operate prospectively only, to govern future conduct and

claims, and do not operate retroactively, to reach conduct and claims arising before the statute's enactment." *Id.* "Since legislatures generally intend statutes to apply prospectively only, this rule of statutory construction is a means of giving effect to legislative intent." *Id*. (citing *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 304–05 (1994)).

Unlike the claims in *Ward*, which arose prior to the enactment of section 38-71-242, Kirven's claims arose *after* the statute's June 4, 2008 effective date. By its terms, section 38-71-242 applies to claims submitted after the statute's effective date of June 4, 2008. Indeed, unlike the claims in *Ward*, the General Assembly expressly prescribed the statute's temporal reach to include the claims at issue in this case. Accordingly, "there is no need to resort to judicial default rules," such as the presumption against retroactivity or the doctrine of constitutional avoidance, to determine whether the legislature intended for section 38-71-242 to apply to Kirven's claims. *Landgraff*, 511 U.S. at 280; *see Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." (citation omitted)). Thus, neither the presumption against retroactivity nor the doctrine of constitutional avoidance bars the application of section 38-71-242 to Kirven's claims.

Nevertheless, our analysis does not conclude here simply because the General Assembly has clearly expressed its intent concerning the temporal reach of section 38-71-242. Rather, we must next determine whether application of that section to Kirven's insurance policy violates the Contract Clause.

B. Contract Clause Analysis

Kirven argues the section 38-71-242 definition of actual charges cannot be applied to insurance contracts entered into prior to the statute's effective date because such an application would violate the Contract Clause of the state and federal constitutions. We agree.

Article 1, section 10 of the United States Constitution provides that no state shall pass a law impairing the obligation of contracts. Likewise, the South Carolina Constitution prohibits laws impairing the obligation of contracts. S.C. Const. art. I, § 4.

"'Although the Contract Clause appears literally to proscribe any impairment, the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.'" *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 35, 736 S.E.2d 651, 661 (2012) (Beatty, J., concurring in part, dissenting in part) (quoting *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 21 (1977)) (internal marks omitted). "Retroactive legislation, though frequently disfavored, is not absolutely proscribed." *In re Marriage of Bouquet*, 546 P.2d 1371, 1376 & n.8 (Cal. 1976) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1797)). Indeed, a state may pass retrospective laws absent direct constitutional prohibition. *Freeborn v. Smith*, 69 U.S. 160, 174–75 (1864).

Thus, to determine whether the Contract Clause limits application of certain laws, the following framework applies:

> A three-step analysis applies to a Contract Clause claim. First, the Court must determine whether the State law has in fact operated as a substantial impairment of a contractual relationship. If the State regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of contractual rights is based upon reasonable conditions and is of a character appropriate to the public purpose.

Mibbs, Inc. v. S.C. Dep't of Rev., 337 S.C. 601, 607, 524 S.E.2d 626, 629 (1999) (citations omitted). For purposes of determining whether there was a substantial impairment of contract, the Court considers whether the law in question altered the reasonable expectations of the parties. *Id.* at 608, 524 S.E.2d at 629 (citing *Ken Moorhead Oil Co. v. Federated Mut. Ins. Co.*, 323 S.C. 532, 542, 476 S.E.2d 481, 486–87 (1996)).

The Honorable Joseph F. Anderson, Jr., United States District Court Judge for the District of South Carolina, has recently addressed a similar Contract Clause argument regarding the application of the section 38-71-242 definition of "actual charges" in the context of supplemental cancer insurance policies. *See Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09-CV-687-JFA, 2011 WL 2294146 (D.S.C. June 8, 2011). We adopt the sound and thorough reasoning of the highly regarded and learned federal judge expressed in *Montague* and find application of section 38-71-242 to Kirven's claims would substantially impair the parties' contractual relationship in violation of the Contract Clause.

We acknowledge the legislature has the authority to modify a court's interpretation of a contractual term; however, when it does so in a manner that retroactively modifies existing contractual obligations, such legislation runs the risk of violating the Contract Clause, as it does here. *See Harleysville*, 401 S.C. at 29–30, 736 S.E.2d at 658 (observing that it is within the legislature's power to statutorily define terms used in insurance policies but holding that applying new statutory definitions to existing contracts violates the Contract Clause); *see also Ward II*, 595 F.3d at 176 (noting retroactive application of statutes potentially implicates the Contract Clause, the Takings Clause, and the Due Process Clause). We find that application of section 38-71-242 to Kirven's policy would substantially impair her existing contract rights.[3]

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[3] Defendants alternatively argue that each time Kirven paid the monthly premium, her policy was renewed and a new and independent insurance contract was formed; thus, according to Defendants, the definition of "actual charges" found in section 38-71-242 was incorporated in Kirven's "new" policies with each monthly renewal since the enactment of that section. As a result, section 38-71-242 applies to the purported new policies and to subsequent claims arising thereunder. We find Defendants' position is manifestly without merit and that Defendants' reliance on *Webb v. South Carolina Insurance Co.*, 305 S.C. 211, 407 S.E.2d 635, (1991) is misplaced. In *Webb*, the Court found the underinsured motorist policy at issue was not one with a grace period or that the insurer was compelled to renew, but instead, was one that specifically contemplated the renegotiation of essential terms upon policy renewal; therefore, each renewed policy constituted a new contract. *Id*. at 213, 407 S.E.2d at 636. In contrast, Kirven's policy states that it is "GUARANTEED RENEWABLE FOR LIFE" and contains a specific renewal agreement that provides a thirty-one-day payment grace period during which the

We are in further agreement with Judge Anderson's thorough analysis that recognized the state may constitutionally impair a party's contract rights provided the impairment serves a significant and legitimate public purpose and that the state law is reasonably related to achieving that public purpose. As with the insurers in *Montague,* benefits were paid to Kirven for many years based on what she was billed by her medical providers; "therefore, it is a stretch to contend that the Defendants now need protection from the terms of the adhesion contract[] . . . issued [to] the Plaintiff[]." *Montague*, 2011 WL 2294146, at *18. When the insurance industry failed in court, "they summoned the General Assembly to legislatively contract for them." *Id.* As Judge Anderson observed, section 38-71-242 "merely protects the [insurers'] private interests." *Id.* at *17. We conclude "there has been no showing that section 38-71-242's alteration of the meaning of 'actual charges' in [Kirven's policy] was necessary to meet an important societal problem related to the affordability of specified disease policies going forward." *Id.* at *18. In concluding that section 38-71-242 does not support a legitimate public purpose, we are influenced by the nature and purpose of supplemental insurance policies, as we described above. *See id.* ("The reason for this difference lies in the purpose of the policies. Through primary insurance policies, insurance companies agree to pay a doctor for the treatment he or she provided an insured. Through supplemental insurance policies, the insurance companies agree to pay the insureds cash . . . [and insureds] are permitted to use the cash benefits in any manner they desire.").

We answer the first certified question, "no."

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policy stays in force. Accordingly, Kirven's policy is a continuing contract. *See Knight v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 20, 23, 374 S.E.2d 520, 522 (Ct. App. 1988) (finding that where a policy renewal is consummated pursuant to a provision in the expiring policy, "the renewal is an extension of the old contract"); *Sur. Indem. Co. v. Estes*, 243 S.C. 593, 598, 135 S.E.2d 226, 228 (1964) (finding the presence of a grace period in a policy renewal provision "clearly contemplates a continuing policy rather than successive, new and independent contracts"); *see also Montague v. Dixie Nat. Life Ins. Co.*, No. 3:09-687-JFA, 2010 WL 2428805, at *2–4 (D.S.C. June 11, 2010) (finding monthly premium payments on or after the effective date of section 38-71-242 did not constitute the formation of new contracts and, thus, the supplemental insurance policies at issue constituted insurance contracts that were "continuous and [did] not expire").

III.

Kirven also argues any attempt by the South Carolina Department of Insurance (Department) to mandate the application of section 38-71-242 to pre-existing policies would exceed the scope of the Department's authority and violate the Contract Clause of the state and federal constitutions. We agree.

Shortly after the enactment of section 38-71-242, the Department issued Bulletin 2008-15 (Bulletin), which directly addressed the enactment of that section. The Bulletin recited the text of section 38-71-242 and stated:

> This statute codifies the Department's longstanding interpretation of the term "actual charges" or similar wording in supplemental cancer policies. For many years, . . . the Department has consistently interpreted those terms to require insurers to pay benefits on an expense-incurred basis, and not to pay benefits to insureds in amounts greater then [sic] a medical provider agreed to accept as payment in full for services rendered to the insured.
>
> . . . . The statute embodies the basic principle of insurance, codified at S.C. Code Ann. § 38-1-20(19), that insurance is a contract of indemnification, and that an insured must suffer an actual out-of-pocket loss to receive payment of benefits. This construction of the term "actual charges" ensures that a few insureds and beneficiaries do not receive windfalls in the form of payments of benefits greater than sums actually paid to health care providers, either by insureds or beneficiaries, or by a primary health insurer. Such windfalls inevitably would cause premiums to increase exponentially for all and would restrict the availability and affordability of supplemental disease policies to the detriment of the citizens of this state. . . . .
>
> Unless expressly required to do so by a final judgment issued before June 4, 2008[,] by a court of competent jurisdiction, insurers that have issued supplemental cancer policies or other specified disease policy [sic] in this state containing the term(s) "actual charge," "actual

> charges," "actual fee," or "actual fees" and that do not contain an express definition of those terms *may not pay any claim or any benefit in excess of the amount specified* in S.C. Code Ann. 38-71-242.

(emphasis added).

Defendants contend the Bulletin requires them to apply the definition of "actual charges" found in section 38-71-242 to all policies, regardless of the issuance date. However, Defendants also acknowledge that, to the extent this Court determines section 38-71-242 does not apply to policies issued before its effective date, the Department is not entitled to enforce the statute—by this Bulletin or otherwise—in a manner contrary to that holding.

Moreover, we find the Bulletin is merely a statement of policy guidance and lacks the force of law.[4] S.C. Code Ann. § 1-23-10(4) ("Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law."); *see Doe v. S.C. Dep't of Health & Human Servs.*, 398 S.C. 62, 68 n.7, 727 S.E.2d 605, 608 n.7 (2011) ("[W]e hold an agency guideline does not have the force of law, and in any event, can never trump a regulation. . . . *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.*" (citiation omitted)). Further, in any event, we find that our answering the first certified question "no" requires us to answer the second certified question in the same manner.

IV.

We answer both certified questions, "no."

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[4] Indeed, the text of the Bulletin itself acknowledges it lacks the force of law:

> Bulletins are the method by which the Director of Insurance formally communicates with persons and entities regulated by the Department. Bulletins are departmental interpretations of South Carolina insurance laws and regulations and provide guidance on the Department's enforcement approach. Bulletins do not provide legal advice. Readers should consult applicable statutes and regulations or contact an attorney for legal advice or for additional information on the impact of that legislation on their specific situation.

CERTIFIED QUESTIONS ANSWERED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and

Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998, Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A. Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miler and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Truseee of the Lois E. Cooley Living Trust, B. Lee Smith

and Margaret H. Smith, Jason A. Underwood, Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame, Respondents.

v.

Shipyard Village Council of Co-Owners, Inc., Appellant.

Shipyard Village Council of Co-Owners, Inc., Third-Party Plaintiff,

v.

Cincinnati Insurance Company, Travelers Insurance Company, Companion Property & Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American Guarantee and Liability Ins. Co., St. Paul Fire and Marine Insurance Company, and Illinois National Insurance Company, Third-Party Defendants.

Appellate Case No. 2012-213634

Appeal From Georgetown County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5241
Heard February 20, 2014 – Filed June 25, 2014

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Carlyle Richardson Cromer and R. Wayne Byrd, both of Turner Padget Graham & Laney, PA, of Myrtle Beach, for Appellant.

Howell V. Bellamy, Jr., and Howell Vaught Bellamy, III, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A. of Myrtle Beach, for Respondents.

KONDUROS, J.: The Shipyard Village Council of Co-Owners, Inc. (the Council) appeals the circuit court's grant of partial summary judgment to owners of condominiums within the development in the case involving faulty windows and sliding doors. The Council argues it did not have a duty to investigate, the business judgment rule should have applied, and a jury could have found it did not breach any duty. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

The condominium development Shipyard Village Horizontal Property Regime (Shipyard Village) in Pawleys Island was established in 1982 pursuant to the recording of the Master Deed. The Council was incorporated to administer the affairs in accordance with the Bylaws through a Board of Directors (the Board). Shipyard Village was built in two phases. Phase I was approved for final occupancy in 1982 and contained two buildings, A and B. Phase II was submitted to condominium ownership in 1998 and was comprised of Buildings C and D.

Section 3.6(c) of the Master Deed provides that a unit's balcony doors including its frame and "window glasses, screens, frames, and casings" are part of each unit. Section 6.1 of the Bylaws provides the manager or the Board is responsible for the maintenance, repair, and replacement of the common elements. Section 6.2 of the Bylaws specifies that unit owners (Co-owners) are responsible for the maintenance and repair of their units. Section 5.6 of the Master Deed states maintenance, repair, and replacement of the common elements are the Board's responsibilities "except in the case of the negligence of a Co-owner . . . , and in the event of such negligence, such expenses of a portion thereof may be assessed as an individual assessment." Additionally, section 12.1 of the Master Deed indicates that if regime property is damaged due to "neglect, willful act[,] or abuse" of a Co-owner and insurance proceeds are insufficient to cover the cost of the damage, the deficiency

amount "shall be charged to such Co-owner as an individual assessment." The Bylaws state in section 6.4 that all maintenance, repair, and replacement expenses are common expenses except when those expenses are not fully reimbursed by insurance proceeds and are necessitated by the failure of a Co-owner to perform the maintenance required by the Bylaws or by the willful act, neglect, or abuse by a Co-owner, in which case they will be charged to the Co-owner as an individual assessment. The Master Deed does not list window flashing as one of Co-owners' responsibilities but window frames and casings are included as Co-owners' responsibilities.

Over the years, Buildings A and B experienced leaks at the windows and balcony doors. In 1993, Procon Waterproofing, Inc., which had waterproofed the buildings in 1990, informed a management company that following its preliminary inspection of the concrete structural slabs of Buildings A and B, it recommended "a structural engineer further evaluate the cracking and spalling [that] is occurring in the pre-cast slabs and beams." In 1994, Procon found that all the work it completed in 1990 was performing as intended with no problems. It noted that for the ocean-front windows, "the metal end stop bead associated with the stucco system which was installed during the original construction over each floor band are beginning to deteriorate and rust." The Council had Procon replace the corroded metal casing beads.

At the June 15, 1999 Board meeting, the Board decided to "notify all the [Co-]owners and inform them that they are responsible for their threshold and window frame on their unit." The property manager sent a letter dated August 11, 1999, to all Co-owners in Buildings A and B stating "the waterproofing of the balcony thresholds and windows are the responsibility of the unit owners." The letter provided Co-owners could waterproof their balcony thresholds and windows for $737.50. In 1999, Henderson Waterproofing performed some stucco and concrete repairs to Buildings A and B. Bobby Warner, the Council's maintenance supervisor at that time, observed the work and did not believe the damage to the building was as severe as Henderson did and did not think an engineer was needed to assess the buildings.

In 2002, the Council hired McGee Consulting Associates to study the windows for Buildings A and B. It determined some of the windows leaked when sprayed by a hose. However, the hose testing failed to comply with the published standards for window leak testing. The hose test indicated "water channels down both sides of

the windows, which starts at the top floor windows and works its way to the ground. The water intrusion had caused some of the wood framing to deteriorate due to wood-rot." During the investigation, McGee discovered some of the windows had been replaced after Hurricane Hugo, in 1989, and appeared to be residential instead of commercial and prefabricated instead of custom made. Because the windows were prefabricated, they were smaller than the opening and wood framing had been installed to fill the gaps. The replacement windows were also less thick than the original windows. An attorney for the Board noted issues with the statute of limitations in pursuing any action for deficiencies in the replacement windows and the original developer had filed bankruptcy in 1993.

The following year, the Council hired Keystone Construction to examine the leaks at the windows and it determined the water was leaking through the stucco instead of the windows. Keystone informed the Council the lack of window flashing was part of the cause of the leaking. It further found the windows were improperly sized and poorly installed and stucco had been used to fill the gaps around the windows.

In 2004, the owners of a unit in Building B, Ben and Katie Morrow, were having water intrusion problems, and in 2005, they replaced their windows. They continued to experience leaks afterwards and hired an architect and an engineer to investigate the cause of the leaking. The architect found "there is water migration through the exterior wall that is not related to the window sill, jamb[,] or header." The new site maintenance supervisor, Richard Bennett, looked into the issue and found sealant joint failures at the window-stucco interface along with cracked stucco could have been causing the problems. The Morrows' engineer reported at a board meeting in 2006 that repairing one window would not solve the leak issue and an entire vertical stack of windows needed to be removed, flashed, and replaced at the same time.

Because the Board was concerned about the uniformity of new windows, complying with codes, stucco being damaged during replacement, individual owners' ability to procure competent contractors, and the need to replace entire stacks at the same time, in 2006, it considered amending the Master Deed to include windows and sliding doors as common elements. The Board received a proposal from Pro-Tec Finishes, Inc. to replace all of the windows in Buildings A and B for a total of $2.48 million. At the annual members' meeting on April 15, 2006, 71.94% of the Co-owners voted on whether to amend the Master Deed to

include the window and sliding doors. To pass the amendment, 66.68% was needed to vote in favor of it, but only 63.59% voted for it. The Board determined ninety units had voted in favor of the amendment, eleven had voted against it, and thirty-nine had not voted. The Council decided to leave voting open for thirty days to allow the Co-owners who did not voted at the meeting or by proxy to vote.[1] Because over 80% of Co-owners voted in favor of the amendment after leaving the voting open, the Board believed the amendment had passed. An amendment to the Master Deed recorded on October 16, 2006, added "[t]he Limited Common Elements shall also include the window glasses, screens, frames and casings" and deleted the language indicating the windows were a part of the unit. On November 14, 2007, another amendment was recorded, stating this amendment was to correct and clarify the previously recorded amendment, which omitted adding the sliding glass doors to the common elements.

In 2006, the Board hired Schneider and Associates, Inc. to investigate the water problems for Buildings A and B. Schneider found that considering the buildings were over thirty years old, it observed better than average building envelope performance. Schneider performed destructive testing on the Morrows' unit and discovered "'the stack' of units was leaking from top-to-bottom at the jamb and sill terminations. The existing conditions rely on the window-wall's frame configuration to 'turn' the water to the exterior. The spandrel, formed by the slab edge, is insufficient to accomplish this alone." Schneider recommended enlarging the spandrel's vertical dimension to allow space for separate flashing assemblies. Schneider oversaw repairs for two units in Building A, but the Board was dissatisfied with its performance and lack of progress.

In August of 2007, the Board hired MEC Engineering Services, Inc. to oversee the remainder of renovations to Buildings A and B. The Board requested MEC procure at least three bids from contractors for the repairs.

On April 19, 2008, the Board reported at the annual members' meeting Buildings A and B needed extensive repairs. The Board informed the members the cost would range between $12 and $13 million and the Co-owners would be charged by special assessment. Some Co-owners of units in Buildings C and D, contacted an

[1] Section 1.5 of the Bylaws states, "Any action which may be taken by a vote of the Co-owners may also be taken by written consent to such action signed by all [C]o-owners entitled to vote."

attorney, who sent a letter to the Board asserting the special assessment was invalid because the 2006 amendment was not properly approved and accordingly the cost of replacement or repairs of windows and sliding doors were the responsibility of the individual Co-owners.

In July 2008, HICAPS presented to the Board that it had identified two primary problems for Buildings A and B. The first problem was the structural concrete was failing due to water and salt intrusion and the reinforcing steel's corrosion. The other problem was the building envelope was not weather tight, which allowed water to enter the structure and caused wood to rot in walls framing the windows and sliding doors. Additionally, the paint sealer was at the end of its lifespan as were the windows, which were failing.

The Board became displeased with MEC and hired Sutton-Kennerly & Associates, Inc. along with Spectrum Engineering Services, Inc. to review MEC's reports, proposals, drawings, and bid specifications. Sutton-Kennerly believed the repairs could be completed at a lower cost than MEC had specified. It also thought some of the proposals and drawings lacked sufficient details and did not agree with some of the proposed repair methods. The Board decided to discontinue MEC's services. Spectrum presented the Board with a report noting failures to the roof system, façade, edge beams, soffits, concrete, expansion joints, horizontal surfaces, and HVAC anchorage. Spectrum reported that rainwater was penetrating the roof, the stucco, lanai slabs, floor beams, and hollow core slabs. Spectrum found the "windows and doors have poor to nonexistent flashing to prevent wind driven rain from getting into the units."

In January 2009, the Board requested Sutton-Kennerly to perform tests and investigate to determine the full scope of repairs required for Buildings A and B and supply a cost estimate. On February 16, 2009, the Board hired Sutton-Kennerly to draft designs for repairs and solicit bids.

On January 29, 2009, some Building C and D Co-owners brought suit against the Council for breach of the Master Deed's covenants and restrictions, injunctive relief, and declaratory judgment due to the recording of the 2006 amendment making windows and sliding doors common elements. Due to the challenge of the 2006 amendment, on March 21, 2009, the Board called a special membership meeting to revote on the amendment. Only 48.31% voted in favor of the

amendment, meaning the Co-owners were still responsible for the unit windows and sliding doors.

In July 2009, the Council notified the Co-owners that repairs would occur for Building B from September 2009 through May 2010 and from September 2010 to May 2011 for Building A. The repairs were estimated to cost $10,944,468. The Council wished to finance the repairs through a special assessment. The proposed assessment was $88,398 per unit for Buildings A and B; $64,868 per unit for three-bedroom units in Buildings C and D; and $68,471 for four-bedroom units in Building C and D. The assessments for Buildings A and B covered the cost to replace their windows and doors. The Co-owners voted on August 1, 2009, on the special assessments. To pass the assessments, 50% plus one vote was needed, and only 44.26% voted in favor. Council informed the members the repairs would be incorporated into the 2010 and 2011 operating budgets and would be billed monthly to the Co-owners in addition to their regular assessments.

On October 7, 2009, more Building C and D Co-owners (Respondents) filed a new suit, alleging negligence and gross negligence, negligent and gross negligent misrepresentation, breach of fiduciary duty, and breach of the Master Deed and requesting a declaratory judgment, injunctive relief, specific performance, and judicial dissolution of the Council. This suit was consolidated with the prior suit. The Council hired a professional engineer, J. Lawrence Elkin, with experience in diagnostic evaluations, building repair design, and construction project management to inspect the premises and analyze the documents from the former construction companies and consultants that had inspected and given opinions on the conditions of Buildings A and B. He noted "[t]he need for the $11,000,000 assessment is more directly associated with the fact that the facility is located ocean front and was constructed nearly 30 years ago." He further stated "similarly aged and located properties undergo major rehabilitations every 25 to 30 years." Elkin opined:

> The [Board] enlisted the assistance of technical experts and consultants to provide them guidance as to the condition of Buildings A & B. The [Board] acted in accordance with their recommendations. At times these recommendations were conflicting; the [Board] made choices based on the best information at [its] disposal and within the constraints of [its] budgets.

On May 4, 2012, Respondents moved for summary judgment or partial summary judgment on their negligence and breach of fiduciary duty causes of action. Following a hearing, the circuit court granted Respondents' partial summary judgment motion on the issues of duty and breach for the negligence claim. It determined the Bylaws and Master Deed impose affirmative duties on the Board to enforce, investigate, and correct known violations of the Master Deed, the Bylaws, and South Carolina Horizontal Property Act (the Act). The court further found the Council breached its duty to investigate the substantial evidence in the record that reasonably showed that Co-owners had neglected the maintenance of their leaking windows and sliding glass doors, which allegedly caused damages to the common elements of Buildings A and B. The circuit court found the business judgment rule was not applicable because the Master Deed, Bylaws, and Act all governed the Board's actions. The circuit court further determined the Council was precluded from asserting the business judgment rule based on its lack of good faith in enforcing the 2006 amendment after June 2008. The court noted that whether the leaking windows and doors caused any damage is for the jury to decide. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) (citing *Hancock v. Mid-South Mgm't Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

I. Duty to Investigate

The Council contends the circuit court erred in finding it had a duty to investigate to determine whether to assess individual Co-owners for the damage to the common elements. It asserts the Master Deed and Bylaws do not contain such a duty.[2] We disagree.

"In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002). "An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 445, 697 S.E.2d 575, 577 (2010). "In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002).

[2] The Council also asserts that if the circuit court granted summary judgment on the fiduciary duty issue, it was error. Respondents did move for summary judgment on the issue of fiduciary duty in addition to on its breach of contract and negligence causes of action. The order only mentions a fiduciary duty in passing and does not make specific rulings on the issue. The circuit court states its grant of summary judgment was only on the issues of duty and breach, presumably for the negligence cause of action. To the extent the circuit court did grant summary judgment on the issue of fiduciary duty, it is reversed. *See O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992) ("We have never imposed the high standard of fiduciary duty on planned community organizations, such as the Board, which are vested with the discretion to ensure that proposed modifications to residential property enhance the entire community. Instead, under the correct standard, the Board has a duty to exercise judgment reasonably and in good faith." (footnote omitted)).

When master deeds and bylaws show a homeowner's association has the obligation to maintain the common elements, the association has a duty to pursue a recovery for any alleged construction defects in the common elements. *Queen's Grant Villas Horizontal Prop. Regimes I-V v. Daniel Int'l Corp.*, 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985).

Section 6.1 of the Bylaws provides the manager or the Board is responsible for the maintenance and repair of the common elements. Section 6.2 of the Bylaws provides that "the Units shall be maintained in good condition and repair by their respective Co-owners." Section 6.3 states:

> In the event that any Co-owner fails to perform the maintenance required of him by these Bylaws or by any lawful Regulation, and such failure creates or permits a condition which is hazardous to life, health, or property, or which unreasonably interferes with the rights of another Co-owner, or which substantially detracts from the value or appearance of the Regime Property, the Board . . . shall, after giving such Co-owner reasonable notice and opportunity to perform such maintenance, cause such maintenance to be performed and charge all reasonable expenses of so doing to such Co-owner by an Individual Assessment.

The Bylaws state in section 6.4 that all maintenance, repair, and replacement expenses are common expenses except when those expenses are not fully reimbursed by insurance proceeds and are necessitated by the failure of a Co-owner to provide maintenance required by the Bylaws or by the willful act, neglect, or abuse by a Co-owner, in which case they will be charged to the Co-owner as an individual assessment.

The circuit court properly granted Respondent's partial summary judgment motion on whether the Council had a duty to investigate. The Council is charged with maintaining the common elements. Should a problem arise with those elements, as did here, the Council is responsible for pursuing any responsible parties, whether they are Co-owners or contractors or the developer. Although some problems' cause may be obvious, here, ample evidence supports different causes. For Council to be able to perform its duty to try to recover from the responsible parties,

it must first find out who caused the problem. Accordingly, even though the Bylaws do not specifically state the Council had a duty to investigate, the duties created by the Bylaws and South Carolina law also support a duty to investigate who is responsible for damage to the common elements. Therefore, the circuit court did not err in granting summary judgment on the issue of duty.

II. Business Judgment Rule

The Council maintains the circuit court erred in determining its conduct should not be judged by the business judgment rule. It argues the business judgment rule applies even when bylaws, the regime act, and a master deed govern conduct. Further, it contends the circuit court erred in finding its conduct was *ultra vires* and thus the business judgment rule did not apply. Additionally, it asserts that even if it had committed an *ultra vires* act, that does not prohibit the business judgment rule from applying to *intra vires* actions. We agree.

"In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); *see also Dockside Ass'n v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing[,] or unconscionable conduct."); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) ("Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." (internal quotation marks omitted)). "[T]he burden of proving good faith is not on the governing board; the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions." *Dockside Ass'n*, 294 S.C. at 87, 362 S.E.2d at 874.

"[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires.*" *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). The business judgment rule only applies to *intra vires* acts, not *ultra vires*

ones. *Kuznik*, 342 S.C. at 605, 538 S.E.2d at 28. A homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative. *Seabrook Island Prop. Owners Ass'n*, 292 S.C. at 348, 356 S.E.2d at 414.

The circuit court erred in finding the business judgment rule did not apply because the Master Deed, Bylaws, and the Act applied instead. The business judgment rule applies to actions allowed by the Master Deed, Bylaws, and Act, *intra vires* acts. The rule does not extend to actions not allowed by the Master Deed, Bylaws, and Act, *ultra vires* acts. The circuit court also erred in finding that because the Council committed two acts it found to be *ultra vires*, the business judgment rule did not apply to any of its actions. The rule would apply to all of its actions except for *ultra vires* ones. As discussed above, the Master Deed and Bylaws did create a duty in the Council to investigate. Therefore, any investigation would be looked at under the business judgment rule to determine if the Council met its duty. Further, the burden is on Respondents to show the Council acted without good faith. However, if the Bylaws and Master Deed specified how duties should be performed, the business judgment rule would not allow the Council to deviate from those simply because what they did was reasonable.

III. Breach of Duty

Shipyard Village asserts the circuit court erred in determining it breached a duty to Respondents. It maintains the record contains evidence it did investigate what was responsible for the water leaking and received contradicting reports. We agree.

"The question of negligence is a mixed question of law and fact. First, the court must resolve, as a matter of law, whether the law recognizes a particular duty." *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010) (citation omitted). If a duty exists, the jury determines whether a breach of the duty that resulted in damages occurred. *Id.*

The record contains evidence the Council did not breach its duty to investigate. It hired many construction and engineering companies and consultants to determine what was causing the water problems. Although some evidence was presented the water was intruding through the doors and windows, other reports indicated the water was coming through the stucco and roof among other ways. The Council utilized several different construction companies over the years that had conflicting

theories and solutions. The record also indicates the Board was informed by its attorneys over the years that initiating a law suit regarding the water problems would be expensive and likely unproductive. The record contains at least a mere scintilla of evidence the Council did not breach its duty to investigate. Accordingly, the circuit court erred in granting Respondents summary judgment on this issue.

CONCLUSION

We affirm the circuit court's grant of summary judgment on the existence of a duty to investigate. Additionally, we reverse the circuit court's decision that the business judgment rule does not apply and its granting summary judgment on the issue of breach of duty and remand the case to the circuit court for trial.[3]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., and CURETON, A.J., concur.

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[3] We decline to rule on Respondents' additional sustaining ground that the Council had the duty to determine the cause of the "cracking and spalling in the pre-cast slabs and beams" in Buildings A and B that Procon observed in 1993 and 1994. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds."); *id.* ("An appellate court may not rely on Rule 220(c), SCACR, . . . when the court believes it would be unwise or unjust to do so in a particular case.")